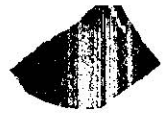

B.B

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 28306-s41I BY KEN CAMPBELL)

* * * * * * * * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. A timely exception was received from Objector Donald C. Marks. Applicant Ken Campbell filed one untimely objection to the Objector's exception. For the reasons stated below, and after having given the objections full consideration, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the August 27, 1985 Proposal for Decision, and incorporates them herein by reference. The Department also accepts and adopts the Proposed Order in this matter, except as expressly modified herein.

RESPONSE TO EXCEPTIONS

The Department hereby responds to the exception made by Objector Marks to the Proposal for Decision in this matter, and to the Applicant's objection to the exception:

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Objector's Exception: Objector Marks excepts to the inclusions of the words "insofar as is practicable" in proposed Permit Condition A, arguing that this language could be interpreted to allow consumptive use of water by the Applicant through possible discharge on surrounding lands.

Objector Marks requests that the quoted language be deleted, and replaced with the sentence, "The Permittee shall not appropriate any water or operate the mining facility in such a manner as will cause the immediate or delayed consumption of any water from Confederate Creek." (Objector's Exception; September 19, 1985.)

Applicant's Objection to the Exception: The Applicant argues that the Objector's proposed language is overinclusive, since it precludes any water being spilled from the mining operation even when there will not be any effect "on the water permits of the lower appropriators": the Applicant argues that the effect of the proposed change is that a spillage of even one gallon of water could be objected to by the other appropriators as "improper".

Applicant Campbell suggests that the phrase "except at all times when water is not being consumed under the permits of prior appropriators" be added to the proposed amendment of Permit Condition A. (Applicant's Objection; September 30, 1985.)

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As the Objector notes in his exception, the intent of the Order in this matter is to insure that Applicant's use of water pursuant to this Permit is non-consumptive. As the Proposal for Decision indicates, the Applicant's appropriation may be allowed only to the extent that it is not consumptive. (See Conclusion of Law 14.) For this reason, the Applicant has been required to pipe the water to and from his gold washing operation.

The Applicant suggests that the language requested by Objector Marks be modified with the words "except at all times when water is not being consumed under the permits of prior appropriators".

This language is premised on two misconceptions, one concerning the scope of existing water rights on Confederate Gulch, and the other on requirement of non-consumptive use.

First, the waters of Confederate Gulch are not being used solely under "the permits of prior appropriators". There are also decreed rights and use rights claimed under the adjudication process which must be taken into account. Second, and most importantly, the Applicant's proposed language suggests that the Applicant may make a consumptive use of water whenever prior appropriators are not exercising their water rights. However, as the Proposal for Decision indicates, there is not substantial credible evidence in the record to support allowing the Applicant to make a consumptive use of water.

The Applicant did not provide sufficient evidence to show that he is able to ever make a consumptive use without adverse effect to prior appropriators. (See Proposal for Decision,

Conclusion of Law 10.) His objection refers to "early spring" as being a time when a spill from his mining operation would not have any effect on the lower appropriators, but his period of appropriation does not begin until April 15, when other water users' periods of appropriation have begun: the Applicant cannot divert water prior to his Permit period of diversion whether or not it affects other appropriators.

The Applicant apparently feels that the Objector's suggested language which forbids the "immediate or delayed consumption of any water from Confederate Creek" (emphasis added) will make him vulnerable to attack on the basis that his water use Permit is not being followed if he even spills one gallon of water. (See September 30, 1985 cover letter to Applicant's Objection.)

It was to cover this situation that the language "insofar as is practicable", to which the Objector takes exception, was included in the Condition. The language was not intended to suggest that the Applicant could defend spillage or wasting of water in his operation on the basis that it was not practical to eliminate such losses or delays in return flow; rather, the language was meant to suggest that a de minimus spill such as an accidental, short-term leakage would not render the Permit voidable. A decision as to whether such a situation had caused or would cause adverse effect to the prior appropriators would be made at such time as the situation arose, and a complaint alleging adverse effect was made. However, the Applicant is on

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notice that, if he is unable to make his use of water in a non-consumptive manner, he will not be allowed to divert pursuant to the Permit in this matter.

In order to foreclose complaints based on de minimus losses of water which do not adversely effect the water rights of prior appropriators, the Objector's proposed condition language will not be included in Permit Condition A in its suggested form. Rather, the phrase "insofar as is practicable" to which the Objector has excepted will be deleted from Condition A, and the sentence "The Permittee shall not appropriate water nor operate the mining facility in such a manner as will cause consumption of water or a delay in the return of water to Confederate Creek" will be added to the Condition.

Therefore, based upon the Findings of Fact and Conclusions of Law, all files and records in this matter, and any modifications specified herein, the Department makes the following:

FINAL ORDER

Subject to the following terms, conditions, restrictions and limitations, that Application No. 28306-41I be granted to Ken Campbell to appropriate 7 gpm up to .139 acre-feet per year between April 15 and July 15 inclusive of each year, from Confederate Gulch, for placer mining. The point of diversion is the SW¼SE¼SE¼ of Section 34, Township 10 North, Range 2 East,

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Broadwater County; the place of use is in the aforementioned description and in the SE¼SW¼SE¼ of Section 34, Township 10 North, Range 2 East, Broadwater County, Montana. The priority date for this Permit is July 23, 1980, 4:20 p.m.

A) The Permittee shall pipe waters to and from the gold washing machine, and shall not discharge any such waters on the surrounding lands. The Permittee shall not appropriate water nor operate the mining facility in such a manner as will cause consumption of water or a delay in the return of water to Confederate Creek.

B) The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

C) This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana Law.

D) The water right granted by this Permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using

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water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 21 day of January, 1986.

Gary Fritz

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
1520 E. 6th Avenue, Helena, MT 59620
(406) 444 - 6605

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on January 21, 1986, she deposited in the United States mail, first class, postage prepaid, a Final Order by the Department on the Application for Beneficial Water Use Permit, by Ken Campbell, Application No. 28306-s41I, addressed to each of the following persons or agencies:

1. Ken Campbell, 100 Time Kiln Rd, Butte, MT 59701
2. Donald C. Marks, Hidden Valley Ranch, Townsend, MT 59644
3. Mr. Ted Doney, P.O. Box 1185, Helena, MT 59624
4. T.J. Reynolds, Water Rights Bureau Field Office, (inter-departmental mail)
5. Peggy A. Elting, Hearing Examiner (hand-deliver)
6. Gary Fritz, Administrator, Water Resources Divison (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
by Sally Martinez

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 21st day of January, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12-1-1987

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INDEX

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 28306-s41I BY KEN CAMPBELL)

* * * * * * * * * *

Pursuant to the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA (1983) and the Montana Water Use Act, Title 85, Chapter 2, MCA (1983) the Department of Natural Resources and Conservation (hereafter, the "Department") held a hearing in the above-captioned matter on Friday, April 26, 1985.

The Applicant, Mr. Ken Campbell, successor in interest to the original Applicant, [redacted], appeared pro se.

Objector Montana Power Company's (hereafter, "MPC") objection was declared invalid and stricken, and therefore, it did not appear.

Objector Donald C. Marks appeared as a witness and by and through counsel of record, Ted Doney.

Jim Beck appeared as a Departmental staff expert witness.

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STATEMENT OF THE CASE

1. Case

The Applicant herein seeks 7 gallons per minute (hereafter, "gpm") up to .25 acre-feet for placer mining from Confederate Gulch in Broadwater County. The original Application sought this flow-rate for 4 hours, twice a week between April 15 and October 15, but Mr. Campbell amended the requested period of use to 4 hours twice a week between April 15 to July 15, inclusive each year. At the hearing, Mr. Campbell again represented that his appropriation period of use would be 4 hours a day, twice a week for the period requested. Assuming the full 7 gpm were used for this period, the maximum volume attainable would be .139 acre-feet.[1]

Mr. Marks objected on the grounds that "Confederate Creek Decree does not allow water to be used for the purpose of mining-there are no unappropriated waters in Confederate." Mr. Marks indicated that there were no conditions under which he would agree to permit issuance.

Montana Power Company objected on the grounds that the proposed appropriation is from Confederate Gulch, tributary to the Missouri, and upstream from MPC's hydroelectric generating facilities on the Missouri, and that insufficient water exists to satisfy MPC's hydropower water rights. Hence, according to MPC, any further depletions from the Missouri will adversely affect

[1] See Finding of Fact No. 4.

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its water rights therein. On April 20, 1983, MPC was ordered to show cause why its objection should not be stricken, because the objection was the same as objections offered in prior hearings where the Department
concluded that the scope of MPC's rights did not warrant denial of the various applications for new use permits on the Missouri, upstream from MPC's hydropower rights. MPC was ordered to show why this objection was different from its previous objections. On April 24, 1984, MPC's objection was stricken and its response to the Show Cause Order denied.

MPC appealed this in MPC vs. Department of Natural Resources, et al., Cause No. 50612. This action is currently pending before the Honorable Gordon Bennett.

Confederate Gulch, long heavily used for irrigation and mining, is a tributary to the Missouri. It has been decreed and, like many Montana streams, spawns more paper water rights than can typically be filled by the supply of the stream. It was characterized as a problem area, typically the subject of frequent and intense disputes over the rights to the use of its water. It has a water commissioner every year, who is characteristically charged with intensive regulation of the stream.

Mr. Campbell intends to divert only unappropriated water during the time the Department Exhibits show water to be physically available for use. His placer claim will use a factory-built gold washer in which he will mix the gravel with his appropriation from Confederate Gulch. The water would be

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pumped approximately 80 feet up from the Creek, through the gravel washing machine, and unleashed over the side of the hill to follow its natural surface course back to the stream. Mr. Campbell claims this use is not consumptive; Mr. Marks claims this use is consumptive.

Mr. Campbell argues that, regardless of the volumes decreed or claimed through the current statewide adjudication process, the Department's own analysis of the water supply in Confederate Gulch shows that water is physically present approximately for the requested period of use. Hence, either some rights are not being used, or they have been abandoned, and this water is legally available for appropriation.

Mr. Marks claims the Decree and Statements of Claim for Existing Rights ("SB76" Claims) are prima facie evidence of appropriative rights, and show that there is no water in Confederate Gulch available for appropriation.

2. Exhibits

The Applicant offered the following exhibits into the record.

Applicant 1 — 7 photographs taken by the Applicant showing the general location of the gold washing machine, area where water will be pumped up from the Creek, and area where water will be discharged.

Applicant 2 — A photocopy of a Certificate of Location for the Lucky Lou Placer Mine, dated November 17, 1967.

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Applicant 3 — A photocopy of a letter dated April 18, 1985, from Mr. Campbell to Mr. Marks informing Mr. Marks of the amendment in the period of use, and explaining Mr. Campbell's intended evidentiary offers. If Mr. Marks intended to object to the Department's studies of the gulch (upon which Mr. Campbell intended to rely), Mr. Campbell requested "all of your original production records for cattle and hay on your ranch as well as your income tax records all for the last 10 years to be presented before the time set for hearing."

Applicant 4 — A photocopy of a description of Mr. Campbell's engine-driven centrifugal pump.

Applicant 5 — A photocopy of information relating to Mr. Campbell's gold washing machine and 3-horsepower pump.

The Applicant's Exhibits were received into the record without objection.

Objector Marks offered the following exhibits for admission into the record.

Objector 1 — A photocopy of the schedule of water rights established in Case No. 1918, Rankin, et al. v. Matthews, et al., the Confederate Gulch Decree.

Objector 2 Computer printout search for Confederate Creek and Confederate Gulch in Basin 41I (Missouri River above Holter Dam) with attached Certificate of Authenticity.

The Applicant objected to the admission of the authenticated computer printouts apparently because he had not been furnished them prior to the hearing and because he had no way of knowing of their accuracy.

The Applicant's demand for production of documents was premised on Mr. Marks' objection to Department Exhibits 1 and 2. Mr. Marks did not object to those exhibits, and therefore had no duty to disclose the exhibit. (See Applicant's Exhibit 3.) Further, the authenticated document is admissible as an original under the Montana Rules of Evidence, Rules 1001(3), 1002, 1006.[2] Pursuant to § 26-1-605 MCA (1983), the printouts are prima facie evidence of the facts stated therein. See also § 85-2-227 MCA (1983). Although prima facie evidence may be rebutted, § 26-1-201(6) MCA (1983), the Applicant's wild accusations are

[2] "Original." An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it . . . If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is all original. Rule 1001(3) M.R.E.

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insufficient to rebut the prima facie showing.[3] Further, the Hearing Examiner did a random check of some of the printout information, and those claims checked accurately reflected the information on SB76 claims on microfilm at the Department.

The printouts are admissible under the far more stringent rules of evidence, so are certainly admissible under the standard applicable herein.[4] § 85-2-121 MCA (1983); Rule 36.12.221(1) A.R.M." . . . the hearing examiner may admit all evidence that possesses probative value, including hearsay if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. . . ."

Additionally, Mr. Campbell's objection may have been premised on the incorrect assumption that the documents were being admitted to prove the validity of the claims therein. The objector later indicated that the printouts were being admitted not as proof of validity of all the rights claimed therein, but as proof that such claims were indeed filed and that as SB76 claims, those filings were entitled to prima facie status. § 85-2-227 MCA (1983). The Hearing Examiner hereby affirms the admission into evidence of Objector's 2.

[3] " I'll object to this being admitted under any circumstances because it is not an original record, it's absolutely something that's a figment of the imagination, I don't even know what it is!" (Testimony of Mr. Campbell.)

[4] See also, Rule 803(15) MRE (1983) (Hearsay exceptions: Availability of declarant immaterial.)

Both of the Objector's Exhibits were received into the record.

The Department offered the following exhibits into the record.

Department 1 A report entitled "An Overview of the Hydrology of Confederate Gulch-1983" prepared for the Department by Jim Beck.

Department 2 A report entitled "An Overview of the Hydrology of Confederate Gulch-1984" prepared for the Department by Jim Beck.

Department 3 A photocopy of an aerial photograph (4 inch = 1 mile scale) of areas in Section 2, 3, 4, 9, 10 15, and 16, Township 9 North, Range 2 East and Sections 26, 34 and 35, Township 10 North, Range 2 East.

Department 4 A photocopy of the Consolidated Confederate Creek Water Cases of 1940, findings of fact, conclusions of law.

The Department Exhibits were accepted into the record without objection.

The Objector moved to dismiss the Application on the grounds that pursuant to Chapter 399, Session Laws of Montana 1985, the Application was speculative. The Applicant argued that the provision for an immediate effective date was an unconstitutional deprivation of his property without due process of law. Chapter

399 provides, "This act applies retroactively within the meaning of 1-2-109, to all applications filed after July 1, 1973." § 1-2-109 MCA (1983) provides, "No law contained in any of the statutes of Montana is retroactive unless expressly so declared." The State of Montana has, obviously, provided for retroactive application of statutes when the legislature expressly so intends. Rankin v. District Court, 70 Mont. 332, 225 p. 804 (1924). When, as here, such retroactive application relates to procedural law rather than substantive rights, it does not violate constitutional prohibitions against deprivation of property without compensation and due process of law. See, Neel v. First Federal Savings of Great Falls, 41 St. Rep. 18 (1984).

The statute in question does not change the prior law regarding speculative appropriations. Appropriative intent has always been a required element of an appropriation. Power v. Switzer, 21 Mont. 523, 55 p. 32 (1898); Toohey v. Campbell, 24 Mont. 13, 60 p. 396 (1900). The legislation merely specifies more clearly when the Department may cease action on applications under the prior statutes providing therefore, and grants rulemaking authority to implement procedures related to those criteria. § 85-2-310 MCA (1983).

Because of the ruling at the hearing, that Chapter 399 applied but did not mandate dismissal of this case, the grant of Objector's motion to apply the new statute is not prejudicial to the Applicant, and he has no standing to complain of the statute's application herein.

Mr. Campbell objected to Mr. Marks' testimony regarding his personal experience and opinion regarding water availability and his lay opinion of the proper conclusions to be drawn from Mr. Beck's reports. Mr. Campbell objected on the grounds that since Department Exhibits 1 and 2 had already been admitted as "historical documents," no further testimony thereon was proper. Mr. Campbell's objection was overruled at the hearing and that ruling is hereby affirmed. Mr. Campbell's objection is founded upon fundamental failure to understand the purpose of admission of evidence, i.e.: the admission of evidence in a trial-type hearing initiates the questioning and testimony thereon, it does not <u>end</u> same. That is, the <u>purpose</u> of admission of evidence is to offer a fact or opinion to the decision maker and allow that fact or opinion to be scrutinized and debated by the parties in open court.

The rules regarding admissibility serve various purposes, one of which is to attempt guarantee of a minimal level of probable veracity. Once that is established, and the foundation is laid, the document or opinion, however, is not assumed true and immune from further scrutiny. The opposite occurs--an open season exists on that document. Without admission, the topic is barred from discussion, subsequent thereto the scrutiny begins.

Most of Mr. Campbell's numerous objections to evidence suffer similar maladies, i.e.: stem from a misunderstanding of the hearing process. All such rulings upon objections not specifically mentioned herein are affirmed without explanation.

The Objector moved to certify the questions raised by the Applicant of abandonment and scope of existing rights in Confederate Gulch. Basically, the Applicant argued that, despite claims to more water than exists in the Gulch, water is physically available for his use during his intended period of use. Therefore, he argued, some of those rights must have been abandoned or are reduced by historic use patterns, because if the paper claims truly reflected the rights in the Creek, the Creek would be dry. The Objector then moved the Department for certification of the issues of abandonment and scope of the rights in Confederate Gulch, pursuant to Chapter No. 596, Montana Session Laws 1985. That statute provides,

> At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1)[5], the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. If the department fails to certify an issue as provided in this section after a timely request by a party to this hearing, the department shall include its denial to certify as part of the record of the hearing.

Although the Applicant herein raised the issue of scope of existing rights, the Hearing Examiner declines to certify those issues to a district court. This case well illustrates the danger lurking in this certification mechanism, and the reason for the Department's discretion in certifying issues.

[5] Subsection (1), refers to § 85-2-309(1) which amends the old Section 309 providing the hearings on objections, such as the instant case, to reflect the possibility of certification.

On the one hand, this is a perfect example of a case for certification. As on many sources in Montana, the paper rights exceed the typical supply. Until the statewide general adjudication is completed, the SB76 claims are no better indication of reality than were the prior filing of notices of appropriation and decrees. The failure of the paper records of appropriative rights to reflect actual historic use patterns prompted the call for the adjudication, but, the pace of verification being necessarily slow, the situation has yet to be remedied. To date, until a final decree is issued for any particular basin, the stack of SB76 claims for that basin merely augments the stack of Notices of Appropriation. Hence, when the Department must make a finding of "unappropriated waters" it is thrust in roughly the same position as a pre-1973 district court hearing a water rights case. The Notices of Appropriation were prima facie proof of their contents, just as are the SB76 claims, see Section 1890 Civil Code 1895 and statutes enacted subsequent thereto, § 85-2-227 MCA (1983). Where testimonial evidence contradicts the filings, the filings may successfully be rebutted. Marshall v. Minlschmidt, 148 Mont. 263, 419 P.2d 186 (1966); Vidal v. Kessler, 100 Mont. 592, 51 P.2d 235 (1935); In the Matter of the Application for Beneficial Water Use Permit No. 51282-s41O and Application for Change of Appropriation Water Right No. G-139972-41O by Ben Lund Farms, Inc. Final Decision Order January 21, 1985.

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In the instant case, the record shows that, at least in 1983 and 1984, water was physically available for use, despite the decreed rights being in excess of the supply.

The Objector argued that mere physical presence of water could not be indicative of unappropriated waters because of the inherent need for flexibility in the exercise of appropriative rights. While historic use necessarily defines the parameters of the right, this use pattern must vary with the need, especially for irrigators[6] whose use patterns will vary according to seasonal and yearly fluctuations in climatic conditions. Hence, the logical extension of the Applicant's argument is that unless the source is always depleted, there is unappropriated water therein, and, conversely, unless the irrigator uses water wastefully, he will be deprived of whatever portion of his right he does not use every year, all the time.

Clearly, the determination of unappropriated water is difficult in the limbo of pre-adjudication. Until the general adjudication produces a final decree for this source, any determination of unappropriated water must be tentative. On the other hand, the Applicant herein is unrepresented. To certify to the district court prior to making a disposition herein would

[6] As opposed, perhaps, to hydroelectric uses, which may not vary quite as dramatically, i.e.: where the user can typically use the entire stream every year.

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require a readjudication of all rights on Confederate Gulch before the Permit issuance or denial. Further, the instant situation is a paradigm of the situation on many surface sources in the state, and would set precedent for certification of all cases prior to Departmental decision thereon. The permit process could effectively be circumvented by any objector raising issues of the scope of the applicant's right in a change proceeding, the Applicant raising issues of determination of the Objector's underlying rights in a new permit case (to rebut an objector's claim of no unappropriated water), or an objector raising the issue in a new use proceeding. If all such cases were to be certified, the permitting process would come to a screeching halt. Further, the state-wide general adjudication would be circumvented, because instead of proceeding in the water courts through that process, all basins would be adjudicated as a result of a departmental certification.

For the reasons that this case represents the typical situation, and that the determination of existing rights in Confederate Gulch is not determinative herein, the Hearing Examiner recommends against certification to the district court. This case is unlike a change authorization, where the Department cannot authorize a change until it has in substantial credible evidence of the scope of the right even before it gets to the issue of adverse effect. That is, the change proceedings assume the proof of the scope of the underlying right, as the Department cannot authorize the change of a right in excess of the historic

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right without creating a new right. In such a situation, a new right would be created, but would, in the guise of the original priority date, encompass the authority to call junior rights. The difference between the right as claimed, and changed, and the historic right, would move to the head of the line, as it were, carrying the earlier priority date, and the authority to shut down rights junior to the earlier date, but, of course, senior to the newly created right. Until final decree, this would constitute irreparable injury to those objectors who could be denied their rights until the true extent of the underlying right were decreed. This could amount to a generation of irrigation seasons where the true seniors would be finally denied their use rights. No later action could restore the lost crops, possible foreclosures, etc. An action for damages would, of course, be available, but to the eye of this Hearing Examiner, money could not compensate for a generation of lost crops.

In contrast, a new appropriation merely allows the appropriator to take his/her place on the ladder of priorities on the source. Especially here, where the source typically has a commissioner, the seniors depend on stream administration to fulfill their rights when the juniors' use makes their supply short. This stream administration allows for the Objectors, as well as all other seniors on the source, to exercise their rights with the flexibility that irrigation demands. Those years when

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increased use by seniors prevents the junior from appropriating, the system works as it should. In those years where demand, for whatever reason, is less, the junior may exercise his appropriation, Beaverhead Canal Company v. Dillon Electric Light & Power Company, 34 Mont. 135, 85 P. 880 (1906). The junior takes his place with notice of the conditions at the time of commencement of the appropriation. Cate v. Hargrave, 41 St. Rep. 697, 68 P.2d 952 (1984). Hence, the Applicant herein, should he choose to commence operations, begins his venture with knowledge that if the owners of decreed rights choose to prevent his use, they may do so in every year. Should the seniors continue to exercise their rights in accordance with the records in evidence herein, the junior will be able to use, as conditioned hereafter, his 7 gpm up to .139 acre-feet.

In reaching this disposition, the Hearing Examiner does not hold that any water in a stream is by definition "unappropriated". Nor does this discussion portend that new use applications will never be appropriate candidates for certification. Simply stated, until a decree is final on this source, the Department must deal with new use applications weighing the evidence in favor of unappropriated waters where it appears that the seniors exercise their rights in such a way that there is, more often than not, water physically available for new use. Montana Power Company v. Carey, 41 St. Rep. 1233, 685 P.2d 1233 (1984).

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FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto.

2. The Application was filed with the Department on July 23, 1980 at 4:20 p.m., and was subsequently amended by the Applicant at the hearing.

3. The original Applicant was L.S. James. His successor in interest is Mr. Campbell, the current Applicant.

4. Mr. Campbell seeks 7 gpm up to .139 acre-feet per year from Confederate Gulch for placer mining. The original Application sought 7 gpm up to .25 acre-feet for use between April 15 and October 1. The Applicant, after reviewing the Department's Exhibits 1 and 2, decided to amend the period of use to conform to the time period when water would be physically available, i.e., April 15 to July 15. (Department Exhibits 1 and 2 showed water was physically available during approximately this time period in 1983 and 1984.) Further, at the hearing, the Applicant explained that his period of use would conform to the pattern described in the original permit Application, 4 hours a day, twice a week. Since the period of use was amended downward, the volume must be reduced accordingly. It is impossible to pump .25 acre-feet by pumping 7 gpm 4 hours a day twice a week. 7 gpm for 60 minutes = 420 gallons per hour.) (4 hours for 27 days = 108 hours of pumping. 420 x 108 = 45,360 gallons per year. 45,360 ÷ 325,851 (gallons per acre-foot) = .139 acre-feet per year. Hence, the Applicant's reduction in period of use has reduced the total volume to .139 acre-feet per year.

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5. The Applicant seeks to divert by means of a portable pump in the SW¼SE¼SE¼ of Section 34, Township 10 North, Range 2 East, Broadwater County, Montana. The place of use is a flat spot approximately 80 feet above the creek, in the SW¼SE¼SE¼ and the SE¼SW¼SE¼, Section 34, Township 10 North, Range 2 East, Broadwater County. The water would be pumped up from the creek, through a gold washing machine, and discharged over the hill to run back down to the gulch. There is no planned conduit for the discharge. The Applicant was uncertain whether he would include any tanks or settling ponds in the operation, and if so, how many. (Testimony of Mr. Campbell.)

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (Testimony of Jim Beck.)

7. The Department published the pertinent facts of the Application on April 8, 15 and 22, 1982, in the Townsend Star, a newspaper of general circulation in the area of the source.

8. The proposed use, mining, will be of material benefit to the Applicant.

9. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

10. In 1983, the Department instituted a program monitoring discharges and flows of Confederate Creek. Reports of the findings and extrapolated estimates of long-term average discharges for 1983 and 1984 are Department's Exhibits 1 and 2. Mr. Beck compiled these reports.

11. Confederate Gulch is characterized by gravelly soils which are highly permeable. Mr. Beck tentatively believes "bank storage" accounts for the relatively stable flows of the Creek. Most of the streams in Montana have extremely high flows for a short period of time during snow melt or spring runoff. As the prime source for the stream, snow, is depleted, the stream rapidly decreases in size, frequently drying up completely. Confederate Gulch shows some signs of this typical stream behavior, but has a greater flow in the late summer. It is a perennial stream.

Mr. Beck and Mr. Campbell believe part of the reason for this is bank storage. (See p. 3, Department Exhibit 1.) Bank storage is a phenomenon whereby the high flows of snowmelt seep into the porous gravels of the stream banks, only to return when the gradient has reversed, i.e.: at the lower stream flows in the later summer. The gulch flows indicated this more in 1983 than in 1984.

12. Mr. Beck estimated the period during which the water would be available for appropriation, assuming that physical presence of water at the gauging station at the Confederate highway crossing meant that water was available. Mr. Beck concluded that this was an appropriate estimate of water availability because the irrigation diversions are primarily upstream from this crossing, and because downstream therefrom, there are springs contributing 5-7 cubic feet per second (hereafter, "cfs") to the gulch. Hence, even when there is no water flowing under the highway, there are 5-7 cfs flowing into

Canyon Ferry. Any water flowing under the highway, while under claim of right by upstream irrigators, is not being used at that time.

13. Using Mr. Beck's assumptions, water is available in Confederate Gulch during the appropriate period of use proposed by the Applicant. During 1983, water would have been available until approximately July 31; during 1984 until July 10. (See Final Tables in Department's 1 and 2.)

14. No quantification can be made of the amount available under Mr. Beck's analysis because the Department took no measurements at the highway crossing. Mr. Beck felt the geography of that portion of stream prevented an accurate measurement to be taken there. On Department's Exhibits 1 and 2, therefore, a record was made of whether or not water was flowing there, but no attempt was made to quantify that amount.

15. In the Matter of the Application for Beneficial Water Use Permit Nos. 29912 and 29913 by Diamond City Mining Co., Proposal for Decision March 29, 1983, the Hearing Examiner found "There is insufficient [sic] in the record to determine if unappropriated waters in the sources of supply [Confederate Gulch and upstream tributaries thereto] are available for the Applicant's proposed use. Waters annually and continuously flow into Canyon Ferry Reservoir from Confederate Gulch; indicating an availability of surplus water. However, this 'surplus' water is actually groundwater arising in the streambed below the Marks' diversion point. Normally, the portion of Confederate Gulch from

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below the Marks' point of diversion to the area where the groundwater arises is without flowing water throughout the year." Proposal at p. 8.

16. Confederate Gulch and its tributaries were decreed and adjudicated in Rankins et al. v. Matthews et al., Nos. 1918 and 1913 (1st J. Dist. Ct. September 24, 1940). (Department 4.)

17. Mr. Marks is a successor in interest to eight water rights decreed in Rankins v. Matthews. He also has a Provisional Permit right to divert 300 miner's inches, up to 530 acre-feet from Confederate Gulch between April 1 and July 31, inclusive, annually. His decreed rights total 965 miner's inches for irrigation of property in Sections 16, 17, 21, 20, 30, 19, Township 9 North, Range 1 East, and Section 25, Township 9 North, Range 1 East, all in Broadwater County.

18. In 1978 and 1979, Mr. Marks was the appointed stream commissioner for Confederate Gulch. Because of the dispute-prone character of the Gulch's use, a stream commissioner is virtually always appointed. (Testimony of Don Marks.)

19. The presence of water under the highway crossing indicates whether or not the upstream water users are completely depleting the stream. It does not indicate whether there are unappropriated waters in the stream.

20. Since coming to Confederate Gulch in 1975, Mr. Marks has never been able to utilize the full amount of his decreed and permitted rights, for lack of water. Except for the period of high spring runoff, typically June 15 through July 1, Mr. Marks is water-short evety year. (Testimony of Mr. Marks.)

21. There is no evidence on this record, other than the allegations of Mr. Campbell, to support his oft-repeated contention that he would be adding water to the gulch because of bank storage and return flow. Unless Mr. Campbell brings water in from a foreign drainage, it is a logical impossibility that his appropriation will create water. It is possible that consumption will be negligible, but simply not logical that he'll be "adding" water to the system. (Testimony of Mr. Campbell.)

22. Mr. Campbell was uncertain of several specifics of his planned appropriation. Whether storage tanks or settling ponds would be used and if so, how many, was the most significant unknown. (Testimony of Mr. Campbell.)

23. Mr. Campbell testified that he would comply with the Water Use Act, as well as any other laws and regulations administered by other state or federal agencies with jurisdiction over his project.

24. The SB76 claims do not reflect actual usage of Confederate Gulch, but rather are records of the particulars of water rights claimed to Confederate Gulch. (Testimony of Mr. Campbell.)

25. Neither does the decree accurately reflect either actual usage, or, probably, the right to use water. Mr. Marks' irrigation includes approximately 650 acres, while the land appurtenant to the water rights he claims to have succeeded to is in excess of two thousand acres. (Testimony of Mr. Marks, Objector's Exhibit 2.)

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26. Mr. Marks has been ranching since 1966, and has been ranching/farming at his current place of use, utilizing water from Confederate Gulch, since 1975.

Wherefore, based on the foregoing, and on the evidence in the record herein, the Hearing Examiner hereby makes the following proposed:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto, see, Title 85, Chapter 2, MCA (1983).

2. The Department gave proper notice of the hearing and all relevant substantive and procedural requirements of law or rule have been met, and therefore, the matter was properly before the Hearing Examiner.

3. The Department must issue a permit if the Applicant proves by substantial credible evidence that,

(a) there are unappropriated waters in the source of supply:
  (i) at times when the water can be put to the use proposed by the applicant;
  (ii) in the amount the applicant seeks to appropriate; and
  (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
(b) the water rights of a prior appropriator will not be adversely affected;
(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
(d) the proposed use of water is a beneficial use;

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(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

§ 85-2-311(1) MCA (1983).

4. The proposed use, mining, is a beneficial use. § 85-2-102(2) MCA (1983); see, Smith v. Duff, 39 Mont. 382, 102 p. 984 (1909).

5. Beneficial use is the base, limit and measure of the right. Toohey v. Campbell, 24 Mont. 13, 60 p. 396 (1900); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); In the Matter of the Application for Beneficial Water Use Permit Nos. 50240-s40J and 50241-s40J by Larry and Phyllis Simpson, Final Order October 31, 1984.

6. The intent of the appropriator further refines the parameters of the right. That is, the use and need for the water must be certain, i.e.: not speculative, and the intent must encompass the entire use for the priority date to relate back to first use. Power v. Switzer, supra. Hence, the priority date of the filing of an Application cannot include amounts requested if "premised on a hope or belief of increased production at some future point." In the Matter of the Application for Beneficial Water Use Permit No. 28224-s41I by Robert H. Loomis and Clark H. and Opal Edenfield. Proposal for Decision at 8, Final Order July 19, 1982.

7. The long established common-law rule regarding speculative intent, see, Bailey v. Tintinger, 45 Mont. 154, 122 p. 575 (1912); Smith v. Duff, supra; In the Matter of the

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Application for Beneficial Water Use Permit No. 54172-s43O by Lockwood Water Users Association, Final Order December 27, 1984, was recently codified as Chapter 399, Session Laws Montana (1985).* That statute applies to the case herein; see, discussion, supra, but does not serve to require the Department to cease action on this Application.

8. The Objectors herein also argued that the doctrine of due diligence also requires dismissal of the Application. Pursuant to Montana Department of Natural Resources and Conservation v. Intake Water Co., 171 Mont. 416 558 P.2d 1110 (1976), the Department concludes that the lengthy delay in bringing this matter to hearing cannot be charged as a sort of laches or lack of diligence, on the part of the Applicant. The Montana Power Company v. Department of Natural Resources and Conservation, et al., case currently pending before the Honorable Gordon Bennett, has served to stymie the hearings on any application upstream of Great Falls, and the requirement of service upon all individual applicants has generally confused and bewildered the nonrepresented applicants.

9. The proposed means of diversion, construction, and operation of the appropriation works are adequate.

10. The Applicant failed to show by substantial credible evidence that waters exist in the amount sought and throughout the period sought for a consumptive appropriation without causing

* This statute does not "codify" the doctrine of 'speculative intent' in the sense that it could reduce a common law doctrine to the terse lines of a statute. It does, however, specify various factors which in all cases indicate lack of bona fide intent.

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adverse effect to prior appropriators. Although the two-year period of record reflected in the Departments Exhibits 1 and 2 shows a flow for the time period requested, that flow was unquantified. Further, a record of unquantified flows for two years on what has indisputably been characterized as an overappropriated stream does not qualify as substantial credible evidence. On the other hand, in prior Departmental decisions regarding Confederate Gulch, it appears from findings therein that no water was found to be available for consumptive uses without causing adverse effect to prior appropriators. In the Matter of the Application for Beneficial Water Use Permit Nos. 29912 and 29913 by Diamond City Mining Co., Proposal for Decision March 29, 1983, Final Decision May 25, 1983; In the Matter of the Application for Beneficial Water Use Permit No. 28224-s411 by Robert H. Loomis and Clark H. and Opal Edenfield, Proposal for Decision January 23, 1982, Final Order July 19, 1982.

11. In Loomis, the conditioned permit was issued based upon the finding of adverse effect of the consumptive use. That is, in the absence of an immediate return of water to the stream, the permitted use was found to threaten disruption to the historical pattern of uses on Confederate Gulch. Loomis, Proposal at p. 13.

12. There is insufficient evidence in the record to make a finding of no adverse effect to prior appropriators. This is because the Applicant's plans were indefinite regarding whether the use would be consumptive. Where there is a time lag before the water will return to the source, the use must be held to be consumptive. Loomis, Diamond City Mining, supra.

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13. The findings of fact in these prior decisions are admissible as rebuttable evidence even as against persons not parties or in privity with parties hereto. Wills v. Morris, 100 Mont. 574, 50 P.2d 862 (1935).

14. As conditioned hereunder, the proposed appropriation satisfies the statutory criteria of unappropriated waters and lack of adverse effect. "Unappropriated waters" and lack of adverse effect must have different meanings where the use is nonconsumptive. In re Grant Hanson, Proposal for Decision, December 3, 1984 at p. 26, Final Order January 2, 1985. As proposed by the Applicant, it cannot be determined whether the use is nonconsumptive, as the time lag between removal of water from the stream and return thereto is unknown. (Testimony of Jim Beck; Mr. Campbell.) Further, the Applicant was sufficiently uncertain of the specifics of his appropriation regarding the use of settling ponds, to allow the Department to find the proposed use to be nonconsumptive. As conditioned hereunder, however, the use would be non-consumptive. In the absence of substantial credible evidence of sufficient water for a consumptive use, only a non-consumptive use can be permitted on this record. The timing of return to the source is critical to such a determination. In re Loomis, supra; In re Diamond City Mining, supra.

15. The Department may, therefore, exercise its discretion to issue the Permit subject to such conditions it deems necessary, to protect the rights of prior appropriators. § 85-2-312(1) MCA (1983). By requiring the Applicant to return

water immediately to the stream, via a pipe or some other conduit, the flows of the Creek will not be disrupted, and the seniors will have access to their decreed rights.

Wherefore, based on the foregoing, the Hearing Examiner hereby makes the following:

PROPOSED ORDER

Subject to the following terms, conditions, restrictions and limitations, that Application No. 28306-41I be granted to Ken Campbell to appropriate 7 gpm up to .139 acre-feet per year between April 15 and July 15 inclusive of each year, from Confederate Gulch, for placer mining. The point of diversion is the SW¼SE¼SE¼ of Section 34, Township 10 North, Range 2 East, Broadwater County; the place of use is in the aforementioned description and in the SE¼SW¼SE¼ of Section 34, Township 10 North, Range 2 East, Broadwater County, Montana. The priority date for this Permit is July 23, 1980, 4:20 p.m.

A) The Permittee shall pipe waters to and from the gold washing machine, and shall not discharge any such waters on the surrounding lands insofar as is practicable.

B) The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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C) This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana Law.

D) The water right granted by this Permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

DONE this 27th day of August, 1985.

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

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Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception of filed.

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 28, 1985, she deposited in the United States mail, First Class mail, an order by the Department on the Application by Ken Campbell, Application No. 28306-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Ken Campbell, 100 Time Kiln Road, Butte, MT 59701
2. Donald C. Marks, Hidden Valley Ranch, Townsend, MT 59644
3. Mr. Ted Doney, P.O. Box 1185, Helena, MT 59624
4. T.J. Reynolds, Water Rights Bureau Field Officer (inter-departmental Mail)
5. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 28th day of August, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohn

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 8-1-88

CASE # 28306

Draft

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER
NO. 28306-s41I BY L. S. JAMES)

* * * * * * * * * *

In response to the instant Show Cause Order, Montana Power Company argues that it is improprer to base such an order on a Proposal for Decision, instead of a final disposition by the agency. No prejudice can possibly accrue to Montana Power Company in this regard. If the seminal decision were not to be upheld by the agency, it necessarily follows that any order proposed by the Hearings Examiner based on a show cause procedure will also be reversed and set for hearing. On the other hand, should the seminal case be upheld, the proposed decision by the Hearings Examiner must necessarily be accepted by us as final agency action. The procedure below merely provides for expeditious processing of the application.

Montana Power Company also claims generally that this agency is estopped to utilize a "show cause proceeding" because its field offices have previously determined the instant objection by Montana Power Company not to be invalid. See MCA 85-2-309. Without passing upon the question of whether the agency can treat a filed objection as invalid without some sort of hearing, see generally, Fuentes v. Shaven, 407 US 67(1972), Board of Regents of State Colleges v. Roth, 408 US 564(1972), Bishop v. Wood, 426

US 341(1976), the argument of Montana Power Company is not convincing. Were the field office's determination conclusive, it would be senseless to hold a hearing in the face of a "valid" objection.

We also note that much of the substance of Montana Power Company's claims have been previously dealt with in orders based on similar objections on behalf of the Bureau of Reclamation. Our reasoning disposing of those arguments also compels the same result herein.

WHEREFORE, the objection of the Montana Power Company to Application for Beneficial Water Use Permit No. 28306-s41I by L. S. James is hereby stricken from the present record.

DONE this 24th day of April, 1984.

Gary Fritz, Administrator
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444-6605

Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444-6704

AFFIDAVIT OF SERVICE
ORDER

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 25, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by L.S. JAMES, Application No. 28306-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. L.S. James, 2201 Colorado St., Butte, MT 59701
2. Donald C. Marks, Hidden Valley Ranch, Townsend, MT 59644
3. Montana Power Co., 40 East Broadway, Butte, MT 59701
4. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 Hand deliver
5. T.J. Reynolds, Helena Field Office (inter-departmental mail)
6. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 25th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85